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3 **UNITED STATES DISTRICT COURT**
4 **WESTERN DISTRICT OF ARKANSAS**

5 JEFFREY SMELSER,

6 Plaintiffs,

7 vs.

8
9 DISCOVER BANK,

10 Defendant.

Case No.: 1:19-cv-01025-SOH

11 **COMPLAINT AND DEMAND FOR**
12 **JURY TRIAL**

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1. Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq.
 2. Intrusion Upon Seclusion

(Unlawful Debt Collection Practices)

26 **COMPLAINT AND DEMAND FOR JURY TRIAL**

27 Plaintiff, Jeffrey Smelser (“Plaintiff”), by and through his attorney, alleges
28 the following against Defendant Discover, Bank (“Discover”):

29 **INTRODUCTION**

- 30 1. Count I of Plaintiffs Complaint is based upon the Telephone Consumer
31 Protection Act (“TCPA”), 47 U.S.C. § 227. The TCPA is a federal statute
32 that broadly regulates the use of automated telephone equipment. Among
33 other things, the TCPA prohibits certain unsolicited marketing calls,
34 restricts the use of automatic dialers or prerecorded messages, and
35

1 delegates rulemaking authority to the Federal Communications
2 Commission (“FCC”).

- 3 2. Count II of Plaintiffs Complaint is based upon Invasion of Privacy –
4 Intrusion upon Seclusion, as derived from § 652B of the Restatement
5 (Second) of Torts which prohibits an intentional intrusion upon the
6 solitude or seclusion of another.

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8 **JURISDICTION AND VENUE**

- 9 3. Jurisdiction of the court arises under 28 U.S.C. § 1331, 28 U.S. C. § 1332
10 and 47 U.S.C. § 227.
11 4. Venue is proper pursuant to 28 U.S.C. 1391(b)(2) in that a substantial part
12 of the events or omissions giving rise to the claim occurred in this District.
13 5. Because Defendant transacts business here, personal jurisdiction is
14 established.

15
16 **PARTIES**

- 17 6. Plaintiff is a natural person residing in Waldo, Columbia County,
18 Arkansas.
19 7. Defendant is a financial institution with its principal place of business
20 located at 2500 Lake Cook Road, Riverwoods, Illinois 60015 and it can be
21 served through its registered agent The Corporation Company at 124 West
22 Capitol Avenue, Suite 1900, Little Rock, Arkansas 72201-3736.
23 8. Defendant acted through its agents, employees, officers, members,
24 directors, heirs, successors, assigns, principals, trustees, sureties,
25 subrogees, representatives, and insurers.

FACTUAL ALLEGATIONS

9. In or around November of 2018, Defendant began placing phone calls to Plaintiff's cellular phone number, ending in 5344, to collect an alleged debt.
10. The calls mainly originated from (385) 261-7178, (480) 550-3296, (480) 550-3203, (480) 550-3280, (614) 758-2322, (614) 758-2356, (801) 619-2532, (614) 758-2394 and (614) 758-2391.
11. Upon information and belief these numbers are owned or operated by Defendant.
12. On or around November 15, 2018, at approximately 4:25 p.m., Plaintiff answered a collection call from Defendant, from telephone number (801) 619-2532; Plaintiff heard a pause before the collection agent began to speak, indicating the use of an automated telephone dialing system.
13. Defendant informed Plaintiff that it was attempting to collect a debt.
14. Plaintiff informed Defendant that he was having financial difficulties and instructed Defendant not to call him and to instead mail future correspondence.
15. On or around January 8, 2019, at approximately 10:40 a.m., Plaintiff answered another collection call from Defendant, from telephone number (614) 758-2358; Plaintiff heard a pause before the collection agent began to speak, indicating the use of an automated telephone dialing system.
16. Defendant informed Plaintiff that it was attempting to collect a debt.
17. Plaintiff instructed Defendant a second time not to contact him any further on his personal phone.

1 18. On or around February 22, 2019, at approximately 8:30 a.m., Plaintiff
2 answered a third collection call from Defendant, from telephone number
3 (614) 758-2394; Plaintiff heard a pause before the collection agent began
4 to speak, indicating the use of an automated telephone dialing system.

5 19. Defendant informed Plaintiff that it was attempting to collect a debt.

6 20. Plaintiff instructed Defendant for a third time not to contact him any further
7 on his personal phone and requested that Defendant only contact him by
8 mail.

9 21. Defendant ignored Plaintiff's first two requests to cease calls and continued
10 calling him through late February 2019.

11 22. Upon information and belief, approximately three hundred (300) calls were
12 made by the Defendant to the Plaintiffs cellular phones after Plaintiff first
13 requested not to be contacted.

14 23. Defendant consistently made collection calls to Plaintiff's personal cellular
15 phone on or about the same time almost every day that Plaintiff was
16 contacted which is evidence that Defendant uses an ATDS.

17 24. For example, Defendant called Plaintiff at 8:20 a.m. (November 13, 2018),
18 8:27 a.m. (November 15, 2018), 8:37 a.m. (November 29, 2018), 8:30 a.m.
19 (December 3, 2018), 8:34 a.m. (December 4, 2018), 8:23 a.m. (December
20 7, 2018), 8:20 a.m. (December 17, 2018), 8:22 a.m. (December 19, 2018),
21 8:22 a.m. (December 20, 2018), 8:22 a.m. (December 21, 2018), 8:19 a.m.
22 (January 4, 2019), 8:20 a.m. (January 23, 2019), and 8:25 a.m. (February
23 18, 2019).

24 25. Although Defendant's principal place of business is in Illinois, Defendant
25 never called Plaintiff from a phone number with an Illinois area code.

1 Instead, Defendant called Plaintiff from numbers with area codes from
2 Utah, Arizona, and Ohio.

3 26. Defendant often called Plaintiffs multiple times on the same day into the
4 late evening hours and on several weekends interrupting his personal time
5 with his family.

6 27. Plaintiff works as a Derrickhand on a drilling rig. His responsibilities
7 include guiding the stands of the drill pipe and his shift hours range from
8 either 6 a.m. to 6 p.m. or 6 p.m. to 6 a.m.

9 28. Defendant called Plaintiff during work hours which caused Plaintiff
10 extreme stress and embarrassment which in turn effected his work
11 performance.

12 29. On days when Plaintiff worked the night shift, Defendant's daytime calls
13 routinely interrupted his sleep.

14 30. Defendant's conduct was not only willful but done with the intention of
15 causing Plaintiff such distress, so as to induce him to pay the debt.

16 31. Defendant's conduct as described above amounted to an unfair or
17 unconscionable means to collect or attempt to collect the alleged debt.

18 32. As a result of Defendant's conduct, Plaintiff has sustained damages,
19 including but not limited to emotional and mental pain and anguish.

20
21 **COUNT I**
22 **(Violations of the TCPA, 47 U.S.C. § 227)**

23 33. Plaintiff incorporates by reference all of the above paragraphs of the
24 Complaint as though fully stated herein.

25 34. Defendant violated the TCPA. Defendant's violations include, but are not
limited to the following:

(a) Prior to the filing of the action, on multiple occasions, Defendant violated TCPA 47 U.S.C. § 227 (b)(1)(A)(iii) which states in pertinent part, “It shall be unlawful for any person within the United States . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice — to any telephone number assigned to a . . . cellular telephone service . . . or any service for which the called party is charged for the call.

(b) Within four years prior to the filing of the action, on multiple occasions, Defendant willfully and/or knowingly contacted Plaintiff at Plaintiff’s cellular telephones using an artificial prerecorded voice or an automatic telephone dialing system and as such, Defendant knowing and/or willfully violated the TCPA.

35. As a result of Defendant’s violations of 47 U.S.C. § 227, Plaintiff is entitled to an award of five hundred dollars (\$500.00) in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B). If the Court finds that Defendant knowingly and/or willfully violated the TCPA, Plaintiff is entitled to an award of one thousand five hundred dollars (\$1,500.00), for each and every violation pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

COUNT II

Invasion of Privacy (Intrusion Upon Seclusion)

36. Plaintiff incorporates by reference all of the above paragraphs of this complaint as though fully set forth herein at length.

37. Defendant violated Plaintiff’s privacy. Defendant’s violations include, but are not limited to, the following:

1 (a) Defendant intentionally intruded, physically or otherwise, upon
2 Plaintiff's solitude and seclusion by engaging in harassing
3 phone calls in an attempt to collect on an alleged debt despite
4 numerous requests for the calls to cease.

5 (b) Defendants conduct would be highly offensive to a reasonable
6 person as Plaintiff received multiple calls per day, including
7 calls that interrupted Plaintiff's duties at his job and interrupted
8 his sleep.

9 (c) Defendant's acts, as described above, were done intentionally
10 with the purpose of coercing Plaintiff to pay the alleged debt.

11 38. Defendant repeatedly called Plaintiff an excessive amount over long
12 periods of time, including multiple calls in a single day, and often during
13 work hours which would cause Plaintiff large amounts of stress and
14 embarrassment.

15 39. As a result of Defendant's violations of Plaintiff's privacy, Defendant is
16 liable to Plaintiff for actual damages. If the court finds that the conduct is
17 found to be egregious, Plaintiff may recover punitive damages.

18 **PRAYER FOR RELIEF**

19 **WHEREFORE**, Plaintiff Jeffrey Smelser, respectfully request judgment be
20 entered against Defendant, Discover Bank, for the following:

- 21 A. Statutory damages pursuant to 47 U.S.C. § 227(b)(3)(B);
22 B. Actual and punitive damages from the invasion of privacy;
23 C. Awarding Plaintiff any pre-judgment and post judgment interest as
24 may be allowed under the law; and
25 D. Any other relief that the Honorable Court deems appropriate.

1 RESPECTFULLY SUBMITTED,

2 Dated: May 30, 2019

By: /s/David A. Chami

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